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SUPREME COURT, U.S.

No. 79-6866

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

ORIGINAL COPY

GERALD MASONE,

Appellant,

- against -

PHYLIS MASONE,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

APPELLANT'S ANSWER IN OPPOSITION TO MOTION TO DISMISS THE APPEAL AND TO DENY CERTIORARI OR, IN THE ALTERNATIVE, TO AFFIRM

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Statement of the Case

The Attorney General of New York has the discretion whether of not to appear when constitutional issues are raised as to the validity of New York statutes in cases before the New York and Federal Courts. When the Attorney General appeared, he submitted and argued in the case herein before the Appellate Division, First Department. The Attorney General also submitted in the New York Court of Appeals when Appellant appealed as a matter of right. (See Attorney General's Brief,

p. 2, citing CPLR #5601(b)).

The Appellate Division, First Department, which has the authority to review facts and law, affirmed without opinion after the Attorney General's submission and hearing the Attorney General's oral argument. The Attorney General refers to ORR v. ORR, 440 U.S. 268 (see page IV of Attorney General's motion) and CHILDS v. CHILDS, 440 U.S. 952 (see page iii of the Attorney General's motion). He mentions this Court's remand to the Appellate Division, Second Department, which considered only a portion of the statutes challenged herein and decided by the Court therein to read such as gender neutral. The Appellate Division, Second Department, remitted the proceedings for a hearing (see Attorney General's Brief, p. 2). The New York Court of Appeals denied constitutional review, app. dsmd., CHILDS v. CHILDS and CHILDS v. APPELLATE DIVISION, 48 NY 2d 754 (1979), app. dsmd., cert. den. ___U.S. ____, 100 S.Ct. 1824 (1980).

All of the above citations refer to an appeal from the Appellate Division, Second Department, which was never reviewed by the New York Court of Appeals and having no binding legal effect on the matter herein which originated from the Appellate Division, First Department. The United States Supreme Court decisions in ORR, supra, and CHILDS, supra, are not followed in the Masone matter. The affirmance by the

Appellate Division, First Department, without remand is an affirmance and determination of the law and the facts violating this Court's mandates. An examination of the record will show constitutional issues were raised and considered in the New York Courts.

The Attorney General's technical claim that this appeal is from the Court of Appeals rather than from the Appellate Division, is an obvious attempt to prevent appellant from enforcing constitutional rights and law as interpreted by this Court. The New York Court of Appeals asked for a second submission on this case before it decided there was no substantive constitutional questions which is a decision similar to its refusal to hear CHILDS, supra, which this Court reversed. This case was appealed as a matter of right to the New York Court of Appeals, where the constitutional issues as raised in the Appellate Division were considered. The Court of Appeals' dismissal is as stated in 28 U.S.C. # 1257 (see Attorney General's Brief, p. A1) is a final judgment or decree rendered by the highest court of the State of New York in which a decision may be had. Even if it were not, appellant's mere labeling of the appeal as being from the Court of Appeals rather than from the Appellate Division should not bar consideration by this Court. There is no substantive difference other than labeling where the appeal comes from and if the Court decides to label the appeal as from the New York Court of

Appeals, then this Court can amend nunc pro tunc. Labeling the Court of Appeals is sought to protect the constitutional right of the appellant to have the dictates of prior United States Supreme Court decisions ORR and CHILDS, et al., supra, applied by New York Courts to this case.

The constitutional questions pursuant to the briefs below and the power of the Appellate Division, to determine law and facts were definitely raised. The Attorney General's papers at least should call for a remand to force the New York Courts below to write an opinion as to the constitutionality of the statutes contested though the length of time since prior United State Supreme Court decisions on matters herein might better call for summary reversal to end the refusal or reluctance of the New York Courts to follow this Court's dictates.

The dismissal by the New York Court of Appeals which appellant appealed to as a matter of right is in effect a decision that the constitutional decisions of this Court are not binding. The Attorney General's brief, p. 7, indicates that is summary review herein. The notice of appeal and jurisdictional statement indicates that the appeal is from both the Court of Appeals and the Appellate Division.

This appeal concerns the constitutionality of New York Statutes and Court decisions as stated in the jurisdictional statement, reviewed in the light of decisions interpreting United States Supreme Court decisions.

The Courts of Bronx and New York County are governed by the Appellate Division, First Department, and the Court of Appeals. The CHILDS case, supra, remand and gender neutral reading, cited by the Attorney General, (Attorney General's Brief, p. 8) is not the law in the Appellate Division, First Department. There was no remand or decision by the Appellate Division, First Department.

The Appellee an employed Department of Social Services supervisor is still collecting from the appellant, a disabled fireman, who was also ordered to pay her counsel fees. The Domestic Relations Law provisions and even Family Court Act #438 (as per the Attorney General's Brief, page A3) only imposes counsel fee obligations on the husband. When counsel fees were fixed throughout this case, only the husband had the legal obligations according to New York Law. The Appellate Division, First Department, did not consider CHILDS, supra, and ORR, supra, to require remand and reconsideration of the decisions at the trial level as did the Appellate Division, Second Department, in CHILDS, supra, because of the mandate of the United States Supreme Court, because the Appellate Division, First Department, was not required to do so. The appellant herein challenged the statutes and decisions in the New York Courts and asked for reversal which has been refused by the New York Court of Appeals.

The Attorney General's claim that even assuming reconsideration below, the same finding would form the basis of

decision whether the statutes were read to authorize awards only to wives or if read gender neutral, ignores and misunderstands the holdings of this Court in ORR and CHILDS, supra. A court in deciding a case should certainly know the law.

The Attorney General's belief, that the affirmance by the Appellate Division, First Department, without opinion, applies the correct principals of law when such courts have never spoken, cuts off all argument by the appellant. Is silence the interpretation of the law? Taken together with the New York Legislature's long delay in amending New York law to gender neutral character forecloses all appeals, which violates appellant's constitutional rights. However, the New York Legislature subsequently acted, the new law became effective on or about July 22, 1980, wherein New York finally effected new divorce, alimony, et al., statutes. Such recent complete change in New York Law after this Court's decision, clearly demonstrates appellant's obligations under the old statutes to be unconstitutional. The highest Appellate Courts of New York were waiting for the Legislature to act, except the Appellate Division, Second Department, which had already been mandated to make earlier interpretation by a remand from this Court. The new New York Law is not retroactive. In order to grant appellant his constitutional rights this Court must force the Appellate Division, First Department, and the New York Court o

Appeals to apply ORR and CHILDS, supra . Unless there is a reversal and an order to the Court of Appeals and Appellate Division, First Department, as there had been to the Appellate Division, Second Department, in the CHILDS case, supra, the appellant will be denied his constitutional rights because he was in-between the law. A finding of substantial constitutional issues and remand to the New York Court of Appeals would require a determination of the issues herein for all of New York State as a decision of this Court would so determine the issue for all of the United States.

The multitudinous number of judges and referees hearing this case, denied due process to appellant. The court should note that appellant, a disabled, retired fireman, could not afford to appeal from every order and decision in this extended litigation. The record clearly shows that the Referee appointed to hear evidence and report to the Court, did not hear the case. Another Referee never appointed by Court order, heard testimony and reported to the Court. How can the Attorney General disclaim this if he was never there. The trial Judge and Appellate Courts never decided the issues of appointment. The trial judge without hearing evidence, based his decision entirely on the undesignated referee's report. Such denial of access to a duly authorized court is a denial of due process of law. Thus the Attorney General is not in a position to argue this point as he is an intervenor as to the constitutionality of

the statutes and therefore has no standing on this matter.

CONCLUSION

THE APPEAL SHOULD BE HEARD WITH PROBABLE JURISDICTION NOTED, OR IN THE ALTERNATIVE, THE ORDER BELOW SHOULD BE REVERSED.

Dated: Bronx, New York
August 6, 1980

Respectfully submitted,

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